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Supreme Court of the United States

October Term, 1968

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No. 311

CONLEY ELECTRONICS CORPORATION,
d/b/a TELEPROMPTER OF LIBERAL, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Conley Electronics Corporation petitions for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on April 22, 1968.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 21-32) is unreported. The memorandum opinion and orders of the Federal Communications Commission (App. B and C, *infra*, pp. 33-36, 39-40) are reported at 7 F.C.C. 2d 120 and 8 F.C.C. 2d 473.

JURISDICTION.

The opinion of the court of appeals (App. A, *infra*, pp. 21-32) was entered on April 22, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Commission's CATV Rule requiring same-day non-duplication protection to local television programs is an unreasonable restraint on the receipt and distribution of information and the exercise of free speech in violation of the First Amendment.

2. In the event of a negative finding to the first question, whether, under the CATV Rules, failure to provide for or permit an evidentiary hearing prior to issuance of a summary order directing the halt of existing services of an established business, threatening the life of the business, is a taking of property without due process of law in violation of the Fifth Amendment and pertinent statutes.

CONSTITUTION AMENDMENTS, STATUTES AND REGULATIONS INVOLVED

The First and Fifth Amendments to the Constitution; Sections 309(a) and (e), 312, 313, 314, 316 and 326 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 309(a) and (e), 312, 313, 314, 316 and 326; Section 554 of the Administrative Procedure Act, 80 Stat. 378, 5 U.S.C. 554; and Sections 74.1103(e), (f) and (g), and 74.1109(a) and (f) of the Rules and Regulations of the Federal Communications Commission, 47 C.F.R. 74.1103 (e), (f) and (g), and 74.1109(a) and (f) are set forth in Appendix E, *infra*, pp. 46-56.

STATEMENT

This case arises out of memorandum opinions and orders of the Federal Communications Commission ordering petitioner CATV system to comply with the nonduplication provision of the Commission's CATV Rules. The particular rule, §74.1103(e), requires the system to provide exclusivity protection to local stations by blacking out the programs of more distant stations carried by the system which duplicate on the same day programs carried by nearer stations.

Petitioner operates the traditional type community antenna television (CATV)[1] system in Liberal, Kansas, which has no local television broadcast station. Petitioner's CATV system was franchised by the town in 1955 when no off-the-air television was available, and has been in operation there since 1956. Originally, the system brought only two signals to Liberal from the nearest and then only technically available point, Amarillo, Texas, located 139 miles away (R. p. 52).[2] A third Amarillo station was subsequently added (R. p. 53). The carriage of these three stations from Amarillo is the principal service offered by petitioner to its subscribers (R. p. 57).

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[1] During its past term the Court has had occasion to review the operation of CATV systems. *United States v. Southwestern Cable Co.*, 392 U. S. ___, 36 U.S.L.W. 4553 and *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U. S. ___, 36 U.S.L.W. 4656. *Southwestern* explains: "CATV systems receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers," *supra*, at 4554.

[2] "R." refers to the Commission Record filed in the Court of Appeals and transmitted to the Clerk of this Court.

With the advent of more available television, the Liberal CATV service was enlarged to 12-channel capacity and carriage increased by adding two TV stations from Garden City, Kansas, located 60 miles from Liberal (KUPK-TV, Channel 13 and KGLD-TV, Channel 11) and one from Ensign, Kansas, 50 miles from Liberal (KTVC, Channel 6) (R. pp. 3-4). All of these Kansas stations were established after the Liberal CATV system – KTVC in 1957; KGLD in 1958; and KUPK-TV in 1964. The two Garden City stations are operated as "satellite"[3] stations of Wichita, Kansas, stations located 200 air miles from Liberal and carrying mainly network programs (R. pp. 3-4). The three Kansas stations are available in Liberal by ordinary reception, but the CATV service offers higher quality reception (R. p. 43).

During its eleven-year history, CATV subscribers in Liberal reached a maximum of 2,612, but this number has recently decreased – without decreases in population – to approximately 2,100, or a decline of 20% (R. p. 7). During this period of decline, the TV stations in Garden City and Ensign were founded and have shown a healthy economic growth (R. pp. 4-6). Petitioner has invested a total of $800,000.00 in its Liberal CATV system which has a present depreciated value of $450,000.00. It receives an average annual gross income of $215,000.00 for its service.

In 1966 the FCC promulgated its CATV Rules with its *Second Report and Order*, 2 F.C.C. 2d 725 (1966). These rules were principally designed to protect the healthy maintenance of local television under the Commission's national allocation scheme and to promote the development of UHF television. CATV unchecked, it was felt, would

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[3] A "satellite" station is one controlled by a larger station and operating principally by rebroadcasting the mother-station's signals.

fragment audiences, thus endangering local and UHF television. To achieve these goals, the CATV Rules require certain restraints on new CATV service, carriage of local stations, and same-day non-duplication protection. CATV systems existing prior to March, 1966 were conferred grandfather rights as to distant signals then carried, but such signals are still subject to the operating restrictions of carriage and non-duplication.

Two months after the effective date of the new rules, petitioner requested a waiver of Section 74.1103 of the Commission's newly promulgated rules and sought an evidentiary hearing to demonstrate that (1) imposition of non-duplication would cause the system's demise; (2) the citizens of Liberal were more closely oriented to Amarillo than to the Kansas station locations; and (3) maintenance of the present service would not be harmful to local television. Additionally, petitioner challenged the validity of the new rules.

By order of February 24, 1967, the Commission without hearing summarily denied the petition for waiver and, further, issued an order for petitioner to comply with Rule 74.1103(e) within thirty days (7 F.C.C. 2d 120 (1967)). Petition for reconsideration and application for stay were likewise denied (8 F.C.C. 2d 473 (1967)).

Petitioner sought review of the Commission's orders in the court of appeals, contending that the non-duplication rule was invalid and that failure to provide for a hearing for waiver of rules threatening destruction of an existing business was likewise invalid. The court of appeals affirmed the Commission order on the grounds that the CATV rules thus invoked were reasonable regulations of petitioner's business and that no substantial ground had been demonstrated warranting a hearing.

The Commission's order complained of here, if enforced, would effectively eliminate approximately sixty percent of the present CATV service in Liberal and the

unique feature of petitioner's business since the Kansas stations already operate within conventional antenna range of Liberal (R. pp. 55-57).

REASONS FOR GRANTING THE WRIT

This Court in recently upholding Commission jurisdiction over CATV expressly reserved judgment on the validity of the CATV Rules promulgated. *United States v. Southwestern Cable Co.*, 392 U. S. ____, 36 U.S.L.W. 4553 (No. 363, June 10, 1968). Local carriage and nonduplication are the basic protections which the Commission has designed for local television, Rule 74.1103, 47 C.F.R. 74.1103. The rule applies to more than 1,800 systems now in operation and is a required condition before any new CATV operation may be undertaken. It affects and limits the available television material and viewing habits of approximately 5% of the television audience or an estimated 2,800,000 American homes[4] and has now been in force for over two years. The CATV Rules also permit summary proceedings affecting existing systems, procedures which were invoked against petitioner here. These challenged rules are a substantial part of daily Commission business and rulings. The issues raised here involve fundamental questions of federal and constitutional law and the public's access to the available stream of communications. They also concern the growth and development of a new communications medium capable of rendering substantially greater information sources and materials to the public. The validity of these rules has yet to be passed upon by the Supreme Court.[5] Because of the substantial

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[4] These statistics are drawn from the May 13, 1968 issue of *Television Digest*, Vol. 8, No. 20, p. 3.

[5] See *United States v. Southwestern Cable Co., supra.*

and immediate public, economic and constitutional dimensions of the impact of the CATV Rules on television service, which has become the principal and most influential medium of mass communications in the Nation, the questions raised should be resolved by this Court.

Proper and sound administration of these regulations in accordance with due process of law requires resolution of the secondary point of whether an evidentiary hearing is required before invoking rules against an existing business and threatening its destruction.

1. The Commission's non-duplication rule in Section 74.1103 and its summary order against petitioner are a prior restraint in the reception and distribution of information and tread upon free speech guarantees of the First Amendment.[6] The non-duplication rule provides that the CATV system, upon request of the local television station, will black out imported signals which on the same day duplicate local signals.

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[6] The court of appeals before deciding on the merits asserts that petitioner failed to raise this challenge below and the agency was thus foreclosed from passing upon an important issue. Actually, petitioner did raise the issue in its microwave application before the Commission involving the same system, *TelePrompTer of Kansas, Inc.*, 3 F.C.C. 2d 588 (1966), and incorporated by reference this ground in this case (R. p. 3). The issue was summarily denied in the other proceeding, since the Commission claims to have passed upon it in rule-making proceedings, *Reconsideration of the Second Report and Order*, 6 F.C.C. 2d 309 at 310-312 (1967) (set forth in Appendix D hereto) and has subsequently been summarily dismissed whenever raised before the Commission. *Helena Television Co.*, 12 F.C.C. 2d 564 (1968); *Texas Community Antennas, Inc.*, 12 F.C.C.2d 469 (1968); *Allen's Television Service, Inc.*, 12 F.C.C.2d 515 (1968); *Ellensburg Television Cable Corp.*, 7 F.C.C.2d 110 (1967); *Minnesota CATV, Inc.*, 7 F.C.C.2d 943 (1967); and *TelePrompTer Corp.*, 7 F.C.C.2d 604 (1967). The Commission has persisted in maintaining that the issue has been definitively passed upon and that the Commission will not re-examine it in its opinions and orders.

The Commission maintains that the enforcement of the non-duplication rule eliminates no programming or the public's access to information, but merely eliminates the duplication of program materials already available in order to allow the local stations a competitive advantage. We concede that *simultaneous* duplication does not limit the viewers' access to available program content, merely his choice of channel or station.[7] However, same-day non-duplication very immediately limits the access of the public to information and materials at the *times available to the viewer*. Furthermore, non-duplication eliminates public access to all but one of competing programs broadcast simultaneously by the local stations. For example, the Huntley-Brinkley show is matched against Walter Cronkite and the viewer must choose between the two. But if CATV can import a signal carrying one of the shows at a different time, both are then available. Limiting petitioner's distribution of news, information and program materials otherwise available by cable television is an unreasonable restriction upon the exercise of free speech in violation of the First Amendment.

"The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute [and] the right to receive . . ." *Griswold v. Connecticut*, 381 U. S. 479, 482 (1965). Communication by any lawful means – motion picture, radio, television, newspaper, closed-circuit, hand-bill, the mails, etc. – falls within the constitutional protections provided by the First Amendment. *ABC v. United States,*

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[7] However, it does eliminate associated public service, public activity and commercial announcements which are of interest to petitioner's subscribers, an important consideration where, as here, those subscribers are oriented more to the "distant" signal city rather than the "local" signal city and, consequently, depend on this source of information.

110 F. Supp. 374 (SD NY, 1953), affirmed, *sub nom., Federal Communications Commission v. ABC,* 347 U. S. 284 (1954); *Weaver v. Jordan,* 64 Cal. 2d 235, 411 P. 2d 289 (1966), *cert. denied,* 385 U. S. 844 (1966).

The entire stream of communications from source to destination is constitutionally protected. This fundamental constitutional principle embraces not only the right of publication but also the rights of dissemination and distribution, as well as of reception. *Saia v. New York,* 334 U. S. 558 (1948); *Winters v. New York,* 333 U. S. 507 (1948); *Martin v. Struthers,* 319 U. S. 141 (1943). Circulation is equally protected. "Liberty of circulating is as essential to that freedom [freedom of press and speech] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex Parte Jackson,* 96 U. S. 727, 733 (1877); *Lovell v. City of Griffin,* 303 U. S. 444 (1938).

Once established that the communication or medium is constitutionally protected, the government shall impose no prior restraints or condition upon the free exercise of a benefit or privilege if the effect thereof is to "inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner,* 374 U. S. 398, 404-405 (1963); and see *LaMont v. Postmaster General,* 381 U. S. 301 (1965).

The primary purpose of the First Amendment, as it relates to speech and press, is to suppress prior restraints upon publication, circulation or distribution. *Joseph Burstyn, Inc. v. Wilson,* 343 U. S. 495 (1952). "Freedoms [guaranteed by the First Amendment] . . . are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock,* 361 U. S. 510, 523 (1960).

Particularly objectionable is the practice of censorship exercised through the vehicle of licensing authority. "The struggle for the freedom of the press was primarily directly against the power of the licensor." *Lovell v. City of Griffin, supra,* at p. 451. See also, Chief Justice Warren's dissent in *Times Film Corporation v. Chicago,* 365 U. S. 43 (1961). Indeed, any "intimidation" by the government upon *distribution* of constitutionally protected material, no matter what the purpose, is hostile to the mandate contained in the First Amendment and must be terminated forthwith. *Bantam Books v. Sullivan,* 372 U. S. 58, 70 (1963).

In the field of radio and television communications the only permissible restraint has been related to the physical limitation of available frequencies in the spectrum. In *NBC v. United States,* 319 U. S. 190 (1943), the Supreme Court held that *because of limitation of available frequencies* reasonable regulation under the licensing standard of public convenience and necessity is neither a violation of the First Amendment nor is it censorship within the meaning of Section 326 of the Communications Act, 47 U.S.C. 326. In another radio licensing case, *Lafayette Radio Electronics Corp. v. Federal Communications Commission,* 345 F.2d 278 (2d Cir., 1965), the court there upheld the Commission's restrictions on the permissible nature of radio transmissions using the Citizen's Band Radio Service *because of natural limitations in available frequencies.*

In preserving scarce frequency space the Commission through its radio licensing has promoted the exercise of free speech, since if everyone were to broadcast no one could be heard. However, Commission reliance on *NBC* and *Lafayette* as authority for prior restraint of CATV carriage is misplaced, since CATV occupies no frequency space. Unlike the broadcast licensing rules, the non-duplication rules do not promote free speech and are unreasonable. The court of appeals, we feel, failed to properly distinguish between the bases for radio licensing regulation in orderly

use of spectrum space and prior restraint of CATV materials designed to grant television broadcasters additional economic protection. Radio licensing is justified only because it is *necessary* to promote free speech. CATV regulation is unjustified because it exercises prior restraint on the receipt and distribution of information, not in promotion of free speech, but in providing economic protection to broadcasting. The cases relied upon by the court of appeals refer to radio or microwave licensing, and are therefore misapplied to the curtailment of CATV carriage of available information and programming. cf. *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F.2d 359 (D.C. Cir., 1963), *cert. denied*, 375 U.S. 951 (1963) and *Idaho Microwave, Inc. v. Federal Communications Commission*, 352 F.2d 729 (D.C. Cir., 1965).

"Congress has from the first emphatically forbidden the [Federal Communications] Commission to exercise any power of censorship over radio communications." *Farmers' Union v. WDAY*, 360 U.S. 525, 529 (1958). Section 326 of the Communications Act (47 U.S.C. 326) provides that the FCC shall promulgate no regulation or *condition* which infringes upon or interferes with the right of free speech, nor shall the Commission be empowered to take any action constituting censorship over radio communications or over "*signals transmitted by any radio station.*" The CATV nonduplication rule cannot be squared with Section 326.

The Commission attempts to justify its restrictive regulation of CATV as an exercise of its responsibility to make television available to all the people of the United States, and as being in furtherance of its national allocation scheme of television frequencies. *First Report and Order*, 38 F.C.C. 683 at 697 (1965). CATV, the Commission explains, can aid in carrying out the allocation policy, but it may *compete* with local broadcasting in upsetting regional exclusivity provisions in the local station's contracts with network programs by importation and duplication of local programs, *Id.* at 702, para. 52-53. From this observation, the

Commission concludes that CATV's unequal footing with broadcasters renders it an *unfair method of competition* and that the requirements of non-duplication and local carriage are not inconsistent with CATV's *supplemental* role. *Id.* at 705-706, para. 57.

From these findings and conclusions, the Commission has determined that every station is entitled to carriage and non-duplication by CATV, *Id.* at 713, para. 76 "in order to ameliorate the adverse impact of CATV competition upon local stations, existing and potential," *Id.* at 713, para. 77. These findings and conclusions are endorsed and reaffirmed in the *Second Report and Order*, 2 F.C.C.2d 725 at 778, paras. 131-133 (1966). In sum, the Commission has cast CATV in a "supplementary role" to television broadcasting, branded it as "unfair competition," and embarked upon an unprecedented course of economic restriction and program control to protect the favored broadcast licensee.[8]

The Commission action is inconsistent with Section 314 of the Communications Act, 47 U.S.C. 314, which prohibits broadcasters from anti-competitive acts, and Section 313 of the Act, 47 U.S.C. 313, which revokes the licenses of anti-trust violators. FCC regulation of radio broadcasting in the interest of orderly use of rare spectrum space, differentiates it from other regulatory agencies which determine the extent of desirable competition[9] in their regulated industries.

Additionally, CATV regulation is inconsistent with judicial precedent holding that radio broadcasting, despite

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[8] Commissioner Loevinger dissented from this new role of eco-regulation for the Commission, and suggested that "expansion of service is not to be attained by the limitation of competition and the imposition of rigorous regulation but rather by stimulating competition and moderating regulation." 38 F.C.C. 683 at 759.

[9] The public interest factors in maintaining free competition in the regulated industries are examined in *Northern Natural Gas Company v. Federal Power Commission*, __F.2d __ (D.C. Cir. No. 21,333, decided June 21, 1968).

licensing, is an area of free competition, *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470 (1940); *Easton Publishing Co. v. Federal Communications Commission*, 175 F.2d 344, 346 (D.C. Cir. 1949).[10]

The Commission's new CATV rules now recast the doctrine of free competition in broadcasting to free competition *among* broadcasters, but free *of* competition from any other medium. Such an overlacing is a corruption of the doctrine of free competition and entirely undermines the concept. Moreover, the Commission's initial finding of "unfair" competition is without precedent and somewhat inconsistent with this Court's finding in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. ___, 36 U.S.L.W. 4656 (No. 618, June 17, 1968), holding that CATV carriage of television signals is not a copyright infringement under the Copyright Act.

Here the Commission represses maximum distribution of communications made possible by technical advances for the economic protection of broadcasting. Petitioner has sought to demonstrate that its operation and distribution does not harm local television. Under these circumstances there is no reasonable protection of the public interest which warrants a restriction on petitioner's First Amendment rights to freely distribute available television signals. Accordingly, the Commission's non-duplication rule and its proscriptive order halting a substantial part of petitioner's distribution without reference to any reasonable public

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[10] See *Carroll Broadcasting Co. v. Federal Communications Commission*, 258 F.2d 440 (D.C. Cir., 1958), where the court held that the doctrine of "free competition" was tempered only to the degree which it could be demonstrated, on the facts and after hearing, that such competition would result in harm to the public interest. But the court was careful to emphasize that the presumption is weighed heavily in favor of free competition and that the task of demonstrating injury to the public interest is "certainly a heavy burden." 258 F.2d at 444.

interest is an unlawful restriction of freedom of speech in violation of the First Amendment.

2. In the absence of a hearing, the issuance of a proscriptive order halting a substantial part of petitioner's business is a deprivation of property without die process of law in violation of the Fifth Amendment. Administrative agencies must observe "procedures which have traditionally been associated with the judicial process." *Hannah v. Larche,* 363 U. S. 420 at 442 (1960).

Modification of a certificate of convenience without hearing raises due process considerations. *Civil Aeronautics Board v. Delta Air Lines,* 367 U.S. 316, 330 (1961), citing *Seatrain Lines v. United States,* 64 F. Supp. 156 at 161 (D. Del. 1946), affirmed 329 U.S. 424 (1947). *Seatrain* held that the ICC could not without a hearing alter or cancel an original certificate given to a water carrier. The lower court had held the order would deprive Seatrain of property without due process of law in violation of the Fifth Amendment, 64 F. Supp. 156 at 161. In affirming this Court noted that *Seatrain* had been conferred "grandfather" rights, as here, and in reliance had expended large sums in its business, which the order would have threatened. See also, *Superior Oil Company v. F.P.C.,* 322 F.2d 601 (9th Cir. 1963), *cert. denied,* 373 U. S. 922 (1964).

Standard Airlines, Inc. v. Civil Aeronautics Board, 177 F.2d 18 (D.C. Cir. 1949) held that a regulatory agency could not create a special class of irregular carrier by granting "letters of registration" with the right to revoke it at any time rather than a certificate of public convenience, in an attempt to circumvent a hearing on revocation or alteration of rights affecting investment and business property. *Id.,* at 20. Here the same device has been employed against the petitioner and other CATV operators who are not license holders. Yet, the Commission, in its "special regulatory control" over CATV business, seeks to alter and destroy petitioner's business by proscriptive order without

permitting the elementary safeguards of due process as provided by the Fifth Amendment.

Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), sets forth due process guidelines in review and suspension of operating privileges: How was the individual to be hurt? What governmental interest was to be protected? How would the governmental interest be affected, if at all, by extending procedural safeguards to cover the challenged action?

Applying these principles to the instant case: petitioner is faced with destruction of its entire investment; the admitted governmental interest is protection of local broadcasting which has failed to demonstrate or even allege harm; as to procedural safeguards, other than convenience, there appears to be no immediate or compelling government interest requiring summary proceedings.

The Commission action has threatened the property and investments of petitioner's eleven year business, established in reliance upon the Commission's licensing of common carrier microwave service to furnish undiluted programming to petitioner's business, and incurred in the period during which the Commission steadfastly maintained it had no jurisdiction over CATV. The Commission's rules in failing to provide for hearing in the issuance of proscriptive orders threatening destruction and economic injury are in violation of due process guarantees of the Fifth Amendment.

The conduct and requirements for adjudication and rule making by government agencies are subject to the provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, which provides that "adjudication" shall be determined on the record after opportunity for a full evidentiary hearing (5 U.S.C. 554).

The Communications Act of 1934, 47 U.S.C. 151 *et seq.*, contains similar safeguards for administrative hearings affecting the rights of parties. The Act provides for a full evidentiary hearing for application for license where there

exists a substantial and material issue of fact, 47 U.S.C. 309(e) and for full hearing for suspension of an existing license, 47 U.S.C. 303(m)(2). Before revoking a license or permit, the Commission must serve a show cause order and allow a party a full hearing, where the *burden of proof is upon the Commission,* 47 U.S.C. 312(c) and (d). Moreover, even a modification of license or construction permit entitles a party to full evidentiary hearing with the burden of proof placed upon the Commission, 47 U.S.C. 316. See *Civil Aeronautics Board v. Delta Air Lines,* 367 U.S. 316 (1961), concerning a modification of a certificate of convenience in violation of Section 401(g) of the Federal Aviation Act of 1958, 49 U.S.C. 1371(g).

In the rules of conduct and operation for CATV, the Commission has initially drafted its regulations with the presumption or taint that CATV operation is "unfair" and adverse to the "public interest." *First Report and Order,* 38 F.C.C. 683, 713 (1965). The rules permit a petition for waiver of the rules which alter the conduct of existing business and suspend such service, Section 74.1109. However, in acting on waiver petitions the Commission may summarily grant or deny the petition or specify other procedures, including oral argument or full evidentiary hearing, Section 74.1109(f). In short, the Commission has the option on the means of procedure. Since it appears before the Commission with the taint that its operations are adverse to the public interest, the CATV system must overcome this presumption before gaining the relief sought, which, in consequence, shifts the burden of proof contrary to the APA and the Communications Act.

Although the Commission did not initially license or otherwise authorize the existing operation of petitioner's CATV service, the Commission now seeks to exercise complete licensing authority over petitioner's business, while relegating it to "second class" business status. The practice of creating a special class over which the administrative body seeks greater regulatory control was condemned

in *Standard Airlines, Inc. v. Civil Aeronautics Board*, 177 F.2d 18 (D.C. Cir. 1949). Notwithstanding the statutory and regulatory requirements, as a matter of elementary fairness, it would seem that the Commission should give, at minimum, the same protections and safeguards to the CATV industry, over which it has assumed indirect control, as it allows to the broadcasting industry, over which it has direct statutory licensing control.

Petitioner's verified petition for waiver of Section 74.1103 of the Commission's rules contains substantial and material factual issues warranting a hearing. See section 309(e) of the Act, 47 USC 309(e) and *Ashbacker Radio Co. v. Federal Communications Commission*, 326 U.S. 327 (1945); *Folkways Broadcasting Co. v. Federal Communications Commission*, 375 F.2d 299 (D.C. Cir. 1967). At heart is petitioner's statement that program exclusivity will destroy its only marketable feature and cause the demise of the system. Additionally, petitioner alleged that there was no corresponding injury to local stations in not receiving program exclusivity. Despite these uncontroverted verified allegation, the Commission rejected petitioner's statements and concluded as a matter of fact that disruption of CATV is minimuzed by its ruling. As to the absence of corresponding injury, the Commission ruled that "a broadcaster need not show specific injury." Here the broadcasters failed to show *any* injury.

This Court's decisions in *United States v. Southwestern Cable Co.*, 392 U.S. __, 36 U.S.L.W. 4553 (No. 363 June 10, 1968); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); and *Federal Power Commission v. Texaco*, 377 U.S. 33 (1964), do not hold to the contrary, since those cases did not involve the roll back of systems whose existence pre-dated promulgation of the rules.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Tenth Circuit Court of Appeals should be granted.

Respectfully submitted,

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